NO. 74-1358

APR 28

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

THOMAS M. MAY and DAVID C. VIGIL, for themselves and on behalf of all others similarly situated,

Petitioners,

v.

THE SUPREME COURT OF THE STATE OF COLORADO, THE JUSTICES OF THE SUPREME COURT OF THE STATE OF COLORADO, THE CLERK OF THE SUPREME COURT OF THE STATE OF COLORADO, THE STATE COURT ADMINISTRATOR OF THE STATE OF COLORADO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID C. VIGIL
Counsel for Petitioners
700 Metropolitan Building
1612 Court Place
Denver, Colorado 80202
534-1131

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I
INTRODUCTION

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Thomas H. May and David C. Vigil, for themselves and on behalf of all others similarly situated, by their counsel petition for a writ of certiorari to review the

decision of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Colorado, dismissing the action brought by Petitioners to enjoin enforcement of a rule which was adopted by the Colorado State Supreme Court requiring payment of a so-called annual registration fee by attorneys admitted to practice in the State of Colorado and providing for suspension from practice if the fee were not paid.

The United States District Court for the District of Colorado dismissed the action for lack of required amount in controversy, and further ruled that the complaint did not state a substantial federal question.

The Court of Appeals for the Tenth Circuit affirmed.

II
OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported at 374 F. Supp. 1210 and is appended hereto as Appendix A. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 508 F.2d 136 and is appended hereto as Appendix B.

III
JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit herein sought to be reviewed was entered on December 31, 1974.

On April 1, 1975, this honorable Court, through Associate Justice White, entered its order extending time to file petition for writ of certiorari to and including April 30, 1975.

The statutory provision believed to confer jurisdiction on this honorable Court to review the judgment in question is 28 U.S.C. §1254 (1).

IV
QUESTIONS PRESENTED FOR REVIEW

1. Does the state supreme court have the power to levy a tax in violation of the state constitution?

2. Is a tax on lawyers, imposed by the state supreme court, in violation of the state constitution, a violation of those lawyers' federal guarantees of due process and equal protection?

In its opinion, the United States Court of Appeals for the Tenth Circuit has decided an important state question in a way in conflict with applicable state law; has decided an important question of federal law which has not been, but should be, settled by this Court; and has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the state supreme court, as to call for an exercise of this Court's power of supervision.

V
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. §1343 (3), District Courts have original jurisdiction of action: "to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . ."

Colorado Constitution, Article III, Distribution of Powers: "the powers of the government of this state are divided into three distinct departments, — the legislative, executive and judicial; and no person or collection of persons

charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Colorado Constitution, Article V, Section 31, Revenue Bills: "all bills for raising revenue shall originate in the house of representatives; but the senate may propose amendments, as in the case of other bills."

Colorado Constitution, Article V, Section 32, Appropriation Bills: "the general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, state institutions, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject."

Colorado Rules of Civil Procedure, Rule 227, Registration Fee, 1973 Colorado Revised Statutes, Vol. 7, Page 576. The pertinent text of C.R.C.P., Rule 227, is set forth in Appendix C.

VI
STATEMENT OF THE CASE

This is an action for declaratory and injunctive relief brought by two attorneys licensed to practice law in the State of Colorado, on behalf of themselves and all other attorneys similarly situated. Petitioners ask for a declaration of the validity of Rule 227 of the Colorado Rules of Civil Procedure and to enjoin the Respondents from enforcing the fee and suspension-for-failure-to-pay-the-fee provisions of the rule. Petitioners assert that the Colorado Supreme Court is without authority to impose such a tax upon attorneys and to suspend them from the practice of law for failure to pay the tax and claim that the adoption and enforcement of the rule, without authority, constitutes a violation of Petitioners' rights to due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the federal constitution.

Petitioners alleged federal jurisdiction under 28 U.S.C. §1331, general federal question jurisdiction, and 28 U.S.C. §1341, special jurisdiction for enjoining a state tax where there is no plain, speedy and efficient remedy in the state courts.

The District Court found that the requisite amount in controversy was not present and dismissed for lack of subject matter jurisdiction. In its opinion and order, appended hereto as Appendix A, the United States District Court, assuming jurisdiction, found that no substantial federal question was raised and that the case could, therefore, be dismissed on the merits.

Petitioners filed an amended complaint, alleging as an additional basis of jurisdiction a federal civil rights act found at 28 U.S.C. §1343 (3), which provides federal jurisdiction without regard to the amount in controversy.

The United States Court of Appeals for the Tenth Circuit, in affirming the District Court's dismissal, found that the complaint did not present a substantial federal question.

VI
GROUNDS AND REASONS FOR GRANTING WRIT OF CERTIORARI

The powers of the departments of government of the State of Colorado are distributed pursuant to Article III of the Constitution of Colorado into three distinct departments:

> The powers of the government of this state are divided into three distinct departments, – the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The legislative department of the government of the State of Colorado is invested by the Colorado Constitution,

Article V, Section 31, with the revenue raising function and power:

> All bills for raising revenue shall originated in the house of representatives; but the senate may propose amendments, as in the case of other bills.

Appropriations for the expense of operating Colorado government are to be made by the legislature pursuant to Article V, Section 32 of the Constitution of the State of Colorado:

> The general appropriation bill shall embrace nothing but appropriations for the expense of the executive, legislative and judicial departments of the state, state institutions, interest on the public debt and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject.

The Supreme Court of the State of Colorado has expressly recognized that the usurpation of powers constitutionally granted to one of the branches of government by another branch of the state government is impermissible. In *People v. Herrera*, Colo., 516 P.2d 626, the Colorado Supreme Court declared:

> We recognize and agree with the laudable, beneficient purposes motivating the enactment... The methods and means by which correction of such inequities and injustices may be attained, however, are circumscribed by constitutional limitations.

> Article III of the Colorado Constitution divides "[t]he powers of the government of this state ... into three distinct departments, – the legislative, executive and judicial" and further provides that:

> > "[N]o person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as is in this constitution expressly directed or permitted."

It is clear that the doctrine of separation of powers applies with equal force to all three branches of the government, as stated in *Hudson v. Annear*, 101 Colo. 551, 75 P.2d 587:

> "***Article III of the Constitution applies not less to the judicial department than to the other departments. It is well, of course, that all departments give pause, that they may not offend. All must answer to the people, in and from whom, as specifically set forth in the Constitution, all political power is invested and derived. Article III, §1.***"

The judiciary can no more exercise a power constitutionally conferred upon the legislature than can the executive. Also, it seems obvious that the legislature is equally powerless to confer executive powers upon the judiciary. *People v. Herrera*, Colo., 516 P.2d 626.

Despite the explicit recognition of the Colorado constitutional prohibition that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others," the Colorado Supreme Court adopted Colorado Rule of Civil Procedure, Rule 227, providing for the collection, by the Clerk of the Colorado Supreme Court, of a so-called annual fee to fund the expense of the operations of the legitimate function of the Colorado Supreme Court in disciplinary administration and unauthorized practice matters. The pertinent text of Rule 227 is appended hereto as Appendix C.

It is Petitioners' contention that this violation of the Constitution of the State of Colorado by the highest court of the State of Colorado denies Petitioners their federally guaranteed rights to due process of law and equal protection of the laws provided in the Fourteenth Amendment to the Constitution of the United States for which Petitioners have no adequate state remedy.

The Constitution of the United States, Article XIV, §1 provides, in part, that:

> . . .nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

There can be little question that the Colorado Supreme Court rule in question here is a "statute" of state-wide application thus bringing the case within the ambit of the Fourteenth Amendment to the Constitution of the United States. *Board of Regents of University of Texas System v. New Left Education Project,* 404 U.S. 541, 92 S.Ct. 652, 30 L.Ed 2d 697 (1972).

The only question then remaining to be determined, is whether Rule 227 of the Colorado Rules of Civil Procedure does violence to the concepts of due process and equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Colorado Supreme Court in *People v. Herrera,* supra, explicitly recognized the impermissibility of one branch of government usurping the powers constitutionally granted to another branch of government and that "article III of the Constitution applies not less to the judicial department than to the other departments." This principle is stated at 16 C.J.S., Constitutional Law, Section 61, where it is stated:

> Mandatory constitutional provisions are binding on all departments of the government. Long usage can neither repeal, nor justify the violation of, such provisions, and disobedience or evasion is not permissible, even though the best interests of the public might apparently be promoted in some respects.

The state constitution is the basic law of the state from which all political power is invested and derived. The departments of state governments must recognize and follow that basic law. *People v. Herrera,* Colo., 516 P.2d 626.

To violate the separation of powers ordained in the Constitution of the State of Colorado is to deny due process of law and equal protection of the laws to the objects of that violation. Although the federal principle of separation of powers is not binding, as such, on the states, nevertheless, the deviation by the state in a particular case from its established constitutional scheme and the legal process pursuant thereto denies due process of law and denies the equal protection of the laws to the victim of that deviation. *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed. 2d 311.

When Petitioners' rights are violated by the state's highest court, then there can be no adequate remedy available in state courts to redress the violation of those rights. *Cantor v. Supreme Court of Pennsylvania*, 353 F. Supp. 1307, footnote 23:

> By the very proclamation of the disciplinary rules, the Supreme Court of Pennsylvania, which may be the appropriate forum for such decisions, has by implication decided that the rules are a valid exercise of its state constitutional power.

If Petitioners are denied access to the federal courts to redress their claimed deprivation of federally constitutionally protected rights and are required to litigate their claim in the courts of Colorado, the ultimate decision as to the validity of the imposition of the licensed act here involved would be made by the same body alleged in Petitioners' complaint to be without taxing authority, but which nonetheless imposed the license tax in issue. Thus it is clear that the Petitioners have no adequate, plain, speedy and efficient remedy in the courts of the State of Colorado, and must, therefore, resort to the federal courts for redress of the claimed violation of Petitioners' federally protected constitutional rights under Fourteenth Amendment to the Constitution of the United States.

VII
CONCLUSION

It would appear that the United States Court of Appeals for the Tenth Circuit has decided an important state question in a way of conflict with applicable state law as enunciated by the Colorado Supreme Court in *People v. Herrera,* supra. Petitioners have been effectively denied access to the federal courts for redress of the claimed violation of their federally protected rights to due process and equal protection of the laws by the conclusion of the lower federal courts that Petitioners' claim does not constitute a substantial federal question. Petitioners urge that the question here presented constitutes an important question of federal law which has not been, but should be, settled by this Court and that the decisions of the lower federal courts so far sanction a departure from the accepted and usual course of judicial proceedings by the Colorado State Supreme Court, as to call for an exercise of this Court's power of supervision.

Denver, Colorado, April 10, 1975.

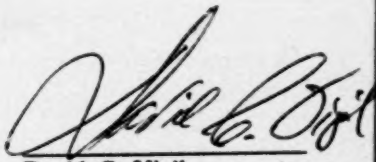
Respectfully submitted,

David C. Vigil
Counsel for Petitioners
700 Metropolitan Building
1612 Court Place
Denver, Colorado 80202
534 - 1131

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of April, 1975, deposited two copies of the foregoing Petition for Certiorari in the United States Mails, first class postage prepaid, and addressed to:

J. D. MacFarlane
Attorney General of the State of Colorado
Attorney for Respondents
Office of the Attorney General
104 State Capitol Building
Denver, Colorado 80203



David C. Vigil

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-5528

Thomas H. MAY and David C. Vigil, for themselves and on behalf of all others similarly situated, Plaintiffs,

v.

The SUPREME COURT OF the STATE OF COLORADO et al., Defendants.
Civ. A. No. C-5528.

United States District Court,
D. Colorado.
April 5, 1974.

Suit by attorney seeking to enjoin enforcement of rule which was adopted by state Supreme Court and which required payment of registration fee by attorneys. The District Court, Chilson, J., held that federal court lacked subject matter jurisdiction of suit and that rule did not violate Fourteenth Amendment.

Dismissed.

OPINION AND ORDER

CHILSON, District Judge.

This action was initiated by the two Plaintiffs who are attorneys admitted to practice law in the State of Colorado, seeking to enjoin the enforcement of a portion of Rule 227 adopted by the Supreme Court of Colorado on October 25, 1973.

This Rule, in pertinent parts, provides:

"(1) Every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall pay an annual fee of $20.00; provided that the fee of any attorney whose first admission to practice is within the preceding five years shall be $5.00. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive, or cause to be sent and received the notices and statements provided for hereafter. The fee shall be used only to defray the costs of disciplinary administration and enforcement, the costs incurred with respect to unauthorized practice matters, and the expenses incurred in the administration of this rule. On or before August 1 of each year, the Chief Justice shall prepare, certify and file with the Clerk a written report of the receipts and disbursements under this rule during the preceding fiscal year ending on June 30th. These reports shall be public documents.

(2) Any attorney who fails to timely pay the fee required under (1) above shall be summarily suspended, provided a notice of delinquency has been issued by the clerk and mailed to the attorney by certified mail addressed to the attorney's last known business address at least 30 days prior to such suspension, unless an excuse has been granted on grounds of financial hardship.

(3) Any attorney suspended under the provisions of (2) above shall be reinstated without further order upon payment of all arrearages to the date of the request for reinstatement."

A complete copy of the Rule is attached to this opinion as an appendix.

The Plaintiffs freely admit that the Colorado Supreme Court has the inherent power to discipline attorneys and regulate unauthorized practice of law, but contend that the

Supreme Court is without authority to impose a fee upon the attorneys for such purposes and to suspend them from the practice of law for failure to pay the fee.

They assert that only the State Legislature has the power to impose such a fee to obtain funds to carry out the purposes of the rule; that the imposition of the fee and the suspension provisions of the rule violate their rights to due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the federal constitution and seek to enjoin the enforcement of those portions of the rule.

The matter presently before the Court is the Defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and failure of the complaint to state a claim upon which relief can be granted.

The complaint alleges jurisdiction of this Court pursuant to Title 28 U.S.C. §1331, which confers jurisdiction in civil actions involving federal questions wherein the amount in controversy exceeds $10,000.

Briefs have been filed in support of and in opposition to the motion to dismiss and the Court has heard oral argument by counsel and is duly advised.

Amount in Controversy

Unless the amount in controversy exceeds the sum of $10,000, this Court is without jurisdiction of the subject matter of this action.

The parties did not discuss this question in their briefs, but during the course of the oral argument, the Court inquired of Plaintiffs' counsel the basis for this allegation. Plaintiffs' counsel, in response, stated that the allegation of the amount in controversy was based on the fact that if the Plaintiffs did not pay the $20.00 annual fee, they would be suspended from the practice of law and that the damages arising from such suspension would be in excess of $10,000.

Although the Defendants did not question the amount in controversy, when it appears that the jurisdictional amount

may not be involved it becomes the duty of the Court to raise the question sua sponte. Subject matter jurisdiction cannot be waived or conferred by the consent, estoppel or laches of the parties. United States v. Corrick, 298 U.S. 435, 56 S.Ct. 829, 80 L.Ed. 1263 (1936); F and S Construction Company v. Jensen, 337 F.2d 160 (10th Cir. 1964); Roberson v. Harris, 393 F.2d 123 (8th Cir. 1968).

Examination of the case law reveals the great weight of authority to be that in suits to enjoin enforcement of taxes and license fees, the amount in controversy is the amount of the tax or fee imposed and not the damage or loss which will be incurred by failure to pay the fee.

In Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248 (1934), the plaintiff sought to enjoin the enforcement of a statewide license tax on salesmen on the ground that it was a denial of equal protection of the laws in violation of the federal constitution. The Court held that the test of the amount in controversy is the total amount of the tax involved and not the value of the right to conduct the business.

Henneford v. Northern Pacific Railway Company, 303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619 (1938), was a suit by Northern Pacific to restrain the enforcement of a tax imposed by the State of Washington. The validity of the tax was assailed under the commerce and due process clauses of the federal constitution. Plaintiff alleged that its business would be damaged to the extent of more than $100,000 as a consequence of its failure to pay the tax. The Court held the amount in controversy was the amount of the tax and not the damages resulting from the failure to pay the tax, and ordered the action dismissed for lack of the jurisdictional amount.

See also Vicksburg S. and P. Railroad Co. v. Nattin, 58 F.2d 979 (5th Cir. 1932), where the attack on the tax was that it violated equal protection rights under the Fourteenth Amendment; Salander v. City of Tacoma, 208 F. 427 (D.C.1913), in which the tax was alleged to be in violation of the plaintiff's rights under the Fourteenth Amendment and that the tax deprived the plaintiff of due process and equal protection of the law; Southern Fruit Co., Inc. v. Porter, 21

F. Supp. 1011 (W.D.S.C. 1937), in which plaintiff sought to enjoin a license tax on trucks as being in violation of his rights to equal protection of the laws as guaranteed by the Fourteenth Amendment. In each of these cases it was held that the amount of the tax is the measure of the amount in controversy for jurisdictional purposes.

The Court concludes that the action should be dismissed for lack of subject matter jurisdiction.

Assuming jurisdiction, does the complaint state a federal question claim upon which relief can be granted?

Although the court's finding of lack of subject matter jurisdiction is dispositive of the motion to dismiss, the Court elects to consider also whether or not the complaint states a claim or claims upon which relief can be granted.

The complaint alleges that the fee and suspension provisions of the rule are void and unenforceable on any one of four grounds, each of which, if separately stated and numbered, would constitute a separate claim. These claims are:

1. That the rule violates Chapter 12 of the 1963 C.R.S. 12–1–1 and 12–1–18 which provides that an attorney may be stricken from the roll of attorneys only for malconduct in his office (Complaint, Para. 10).

2. There is no provision of the constitution or statutes of the State of Colorado which permit the Colorado Supreme Court to impose such a license tax (Complaint, Para. 12).

3. That the imposition and collection of the "tax" by the Colorado Supreme Court is a usurpation of legislative power and in violation of the doctrine of separation of powers set forth in the Colorado Constitution, and that such violation constitutes an invasion of the Plaintiffs' due process and equal protection rights under the Fourteenth Amendment to the federal constitution (Complaint, Para. 13).

4. That the difference in treatment accorded lawyers who pay the fee and those who do not constitutes invidious discrimination against those who do not pay the fee and is in violation of due process and equal protection rights under the Fourteenth Amendment to the federal constitution (Complaint, Para. 14).

The first and second claims are state claims and do not raise a federal question. The third and fourth claims are claims based on a federal question. If either or both of the federal question claims state a claim upon which relief can be granted, this Court may or may not exercise pendent jurisdiction of the state claims, a question we do not now decide.

If neither of the federal question claims state a claim upon which relief can be granted, this Court will have no jurisdiction to determine the two state claims. Emmons v. Smitt, 149 F.2d 869 at 872 (6th Cir. 1945). We, therefore, turn our attention to the federal question claims.

Third Claim

From Paragraph 13 of the complaint, and from Plaintiffs' brief, it appears that Plaintiffs assert that the $20.00 fee imposed by Rule 227 is a "tax"; that Article III of the Colorado Constitution provides for separation of powers among the legislative, judicial and executive branches of the state government; that Article V, Sections 31, 32 and 35 of the Colorado Constitution delegates to the Legislature the power to raise revenue and appropriate funds for all three branches; and that the Supreme Court, in imposing the $20.00 annual fee, usurped the tax powers delegated to the State Legislature.

Upon these allegations, that the Colorado Supreme Court has violated the Colorado constitutional separation of powers, the Plaintiffs make the following federal question claim:

"To violate the separation of powers ordained in the Constitution of the State of Colorado is to deny due process of law and equal protection of the laws to the objects of that violation. Although the federal principle of separation of powers is not binding, as such, on the

states, nevertheless, the deviation by the state in a particular case from its established constitutional scheme and the legal process pursuant thereto denies due process of law and denies the equal protection of the laws to the victim of that deviation." (Plaintiffs' brief, pages 11 and 12.)

In support of this assertion Plaintiffs cite two cases, Minder v. Georgia, 183 U.S. 559, 22 S.Ct. 224, 46 L.Ed 328 (1902), and Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945).

Neither case supports the Plaintiffs' statement. Neither case involved an alleged violation of a state's constitutional separation of powers and neither indicate that such a violation would be a violation of due process and equal protection under the Fourteenth Amendment.

In Minder v. Georgia, Minder was convicted of murder in the state court and appealed his conviction to the United States Supreme Court, alleging a violation of his Fourteenth Amendment rights to equal protection of the laws and due process because out-of-state witnesses for Minder refused to appear and testify, and Georgia law was powerless to require their attendance or to obtain their depositions. The Supreme Court said:

". . . Because it not within the power of the Georgia courts to compel the attendance of witnesses who are beyond the limits of the state, or because the taking or use of depositions of witnesses so situated in criminal cases on behalf of defendants is not provided for, and may not be recognized in Georgia, we cannot interfere with the administration of justice in that state on the ground of a violation of the 14th Amendment in these particulars."

Republic Pictures involved an action for overtime pay under the Federal Fair Labor Standards Act. The defendant contended it was not engaged in interstate commerce and that the Iowa statute of limitations barred recovery. There was

involved no question of a violation of state separation of powers and the effect of such violation on Fourteenth Amendment rights.

Assuming, without deciding, that the Colorado Supreme Court violated the separation of powers provisions of the Constitution by imposing the annual fee and suspension for non-payment, we have found no authority which could be construed to support Plaintiffs' contention that that, in and of itself "... is to deny due process of law and equal protection of the laws ..." to the Plaintiffs.

The concept of separation of powers embodied in the federal constitution is not mandatory in state governments and is not enforceable against the states as a matter of constitutional law. Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957); Benoit v. Gardner, 351 F.2d 846 (1st Cir. 1965); Snell v. Wyman, 281 F.Supp. 853 (S.D.N.Y. 1968).

It would follow that any violations by a branch of the state government of a state's constitutional separation of powers is not a violation of the federal constitution and is a matter solely of state concern.

Fourth Claim

The fourth claim, that the difference in treatment accorded those who pay the fee and those who do not is violative of due process and equal protection rights under the Fourteenth Amendment, is without merit.

Rules requiring a practicing lawyer to pay reasonable annual dues and providing suspension for non-payment do not violate the Fourteenth Amendment to the federal constitution. Lathrop v. Donohue, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); Cantor v. Supreme Court of Pennsylvania, 353 F.Supp. 1307 (E.D.Pa. 1973).

The fourth claim does not state a claim upon which relief can be granted.

Lack of Adequate Remedy

In the first paragraph of the complaint Plaintiffs refer to 28 U.S.C. §1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Court is somewhat uncertain as to why this section is mentioned.

To eliminate any uncertainties as to the Court's ruling in this matter, the Court concludes that the courts of the State of Colorado are open to the Plaintiffs to litigate all of their attacks upon the rule, and if they believe that their federal rights have been denied to them by the decisions of the state courts, they have the right to apply to the United States Supreme Court for a writ of certiorari to review those decisions with respect to their claimed federal rights. The Court is of the opinion and concludes that a plain, speedy and efficient remedy may be had by the Plaintiffs in the courts of the State of Colorado.

CONCLUSION

The Court concludes that it does not have subject matter jurisdiction of this action; that the complaint states no federal question claim upon which relief can be granted; that, therefore, this Court is without jurisdiction to hear the claims based on state law and that the complaint, in its entirety, should be dismissed.

IT IS, THEREFORE, ORDERED that the Defendants' motion to dismiss the complaint is hereby sustained; that judgment of dismissal of the complaint shall forthwith enter, and that Defendants have judgment against the Plaintiffs for their costs, to be taxed by the Clerk of the Court upon the filing of a bill of costs.

APPENDIX

227. Registration Fee

(1) Every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall pay an annual fee of $20.00; provided that the fee of any attorney whose first admission to practice is within the preceding five years shall be $5.00. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive, or cause to be sent and received the notices and statements provided for hereafter. The fee shall be used only to defray the costs of disciplinary administration and enforcement, the costs incurred with respect to unauthorized practice matters, and the expenses incurred in the administration of this rule. On or before August 1, of each year, the Chief Justice shall prepare, certify and file with the Clerk a written report of the receipts and disbursements under this rule during the preceding fiscal year ending on June 30th. These reports shall be public documents.

(2) Any attorney who fails to timely pay the fee required under (1) above shall be summarily suspended, provided a notice of delinquency has been issued by the clerk and mailed to the attorney by certified mail addressed to the attorney's last known business address at least 30 days prior to such suspension, unless an excuse has been granted on grounds of financial hardship.

(3) Any attorney suspended under the provisions of (2) above shall be reinstated without further order upon payment of all arrearages to the date of the request for reinstatement.

(4) All persons required by this rule to pay an annual fee shall on or before January 2 of every year, commencing January 2, 1974, file a statement, on a form prescribed by the Clerk, setting forth (a) date of admission to the Colorado Supreme Court, (b) current residence and office addresses and (c) such other information as the Clerk may from time to time direct. In addition to such statement, every attorney shall file a supplemental statement of change in the informa-

tion previously submitted within 30 days of such change. All persons first becoming subject to this rule by admission after January 2, 1974 shall file the statement required by this rule at the time of admission, but no annual fee shall be payable until the 1st day of January next following such admission.

(5) Within 20 days of the receipt of each fee and of each statement or supplement thereto filed by an attorney in accordance with the provisions of (4) above, receipt thereof shall be acknowledged, on a form prescribed by the Clerk, in order to enable the attorney on request to demonstrate compliance with the requirement of (1) and (4) above.

(6) Any attorney who fails to file the statement or supplement thereto in accordance with the requirements of (4) above shall be summarily suspended until compliance, whereupon there shall be reinstatement without further order; provided such suspension shall not occur until 30 days following the giving of notice as provided in (2) above.

(7) An attorney who has retired or is not engaged in practice shall file a notice in writing that he or she desires to transfer to inactive status and discontinue the practice of law. Upon the filing of such notice, the attorney shall no longer be eligible to practice law but shall continue to file the statements required by this rule for six years thereafter in order to be located in the event of complaints concerning conduct prior to transfer to inactive status. The attorney, however, will be relieved from the payment of the fee imposed by this rule upon active practitioners.

(8) Upon the filing of a notice to transfer to inactive status, an attorney shall be removed from the role of those classified as active until and unless a request for reinstatement is made and granted. Reinstatement shall be granted, unless the attorney is subject to an outstanding order of suspension or disbarment, upon the payment of any assessment in effect for the year the request is made and any arrearages accumulated prior to transfer to inactive status.

Adopted and effective this 25th day of October, A.D. 1973, by the Court En Banc.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
No. 74-1183

Thomas H. MAY and David C. Vigil, for themselves and on behalf of all others similarly situated, Appellants,

v.

The SUPREME COURT OF THE STATE OF COLORADO, et al., Appellees.

No. 74-1183.

United States Court of Appeals,
Tenth Circuit

Argued Nov. 18, 1974.

Decided Dec. 31, 1974.

Class action was brought by attorneys to enjoin enforcement of Colorado Rules of Civil Procedure requiring that an annual fee of $20 be paid to clerk of Supreme Court of Colorado by each lawyer admitted to practice in the state and providing for suspension from practice if fee were not paid. The United States District Court for the District of Colorado, Olin Hatfield Chilson, J., 374 F.Supp. 1210 dismissed action for lack of required amount in controversy, and further found that the complaint did not state a substantial federal question, and plaintiffs appealed. The Court of Appeals, Seth, Circuit Judge, held that federal jurisdiction could not be sustained on basis of tax injunction statute, that amount in controversy was amount of fee rather than value of plaintiffs' right to practice law and thus jurisdictional amount was not met, and that federal jurisdiction was not available under civil rights jurisdictional statute.

Affirmed.

Barrett, Circuit Judge, filed a concurring opinion.

Before LEWIS, Chief Judge, and SETH and BARRETT, Circuit Judges.

SETH, Circuit Judge.

Plaintiffs-appellants filed suit on behalf of themselves and all others similarly situated seeking to enjoin the enforcement of Rule 227, Colorado Rules of Civil Procedure, and asking a refund of all monies paid by members of the class pursuant to the rule. Rule 227 requires that an annual fee of twenty dollars (five dollars in certain instances) be paid to the Clerk of the Supreme Court of Colorado by each lawyer admitted to practice in the state. The funds so collected are to be used by the Colorado Supreme Court only to "defray the costs of disciplinary administration and enforcement" proceedings brought against lawyers. The rule also provides for suspension from practice if the fee is not paid.

Defendants filed a motion to dismiss, asserting lack of personal jurisdiction, lack of subject matter jurisdiction, and failure to state a claim upon which relief could be granted. The question of convening a three-judge court was also argued by both sides. After hearings on the motions, the trial judge dismissed the action for lack of the required amount in controversy, and further found that the complaint did not state a substantial federal question.

The initial complaint alleged jurisdiction under 28 U.S.C. §§1331 and 1341. After the district judge ruled on the motions referred to above, the plaintiffs tendered an amended complaint alleging jurisdiction under 28 U.S.C. §1343. On this appeal each of these sections is urged as a basis for jurisdiction. We will consider them all, since federal jurisdiction may be sustained on the basis of a statute not relied on or alleged in the pleadings. Sikora v. Brenner, 126 U.S. App. D.C. 357, 379 F.2d 134; Paynes v. Lee, 377 F.2d 61 (5th Cir.).

In reliance on 28 U.S.C. §1341, the appellants are faced with the trial court's finding that there was a plain, speedy, and efficient remedy available in the Colorado courts, assuming that the fee required by Rule 227 is a "tax." But in any event 28 U.S.C. §1341 does not operate to confer

jurisdiction but instead limits jurisdiction which might otherwise exist. 28 U.S.C. §1331 asserted by plaintiffs as a basis for jurisdiction is, of course, the federal question section and jurisdiction is there provided, where the amount in controversy exceeds $10,000 and the action "arises under the Constitution, laws, or treaties of the United States." As analyzed by the trial court the complaint presents two state claims and two federal claims. The federal claims with which we are here concerned are:

1. That the imposition and collection of the "tax" by the Colorado Supreme Court is a usurpation of legislative power and in violation of the doctrine of separation of powers set forth in the Colorado Constitution, and that such violation constitutes an invasion of the plaintiff's due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

2. That the difference in treatment accorded lawyers who pay the fee and those who do not constitutes invidious discrimination against those who do not pay the fee and is in violation of due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

The amount in controversy requirement under 28 U.S.C. §1331 has been considered in a number of cases involving fees and assessments. In the case before us the plaintiffs will be suspended from the practice of law if they do not pay the fee. Plaintiffs assert that the amount in controversy is not the fee but the value of their right to practice law, and this is more than $10,000. The trial court found to the contrary, and in so doing it followed the rule set forth in Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248. It thus held that the amount in controversy is the amount of the tax or fee imposed rather than the financial effect of failure to pay the fee. *See also* Henneford v. Northern Pacific Ry. Co., 303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619; Vicksburg, S. & P. Ry. Co. v. Nattin, 58 F.2d 979 (5th Cir.).

Plaintiffs assert on appeal that in cases where an injunction is sought the amount in controversy is measured by the value of the right sought to be protected. Some case law

supports this as a general proposition: American Distilling Co. v. City of Sausalito, 73 F.Supp. 520 (N.D. Cal.); Caron Corp. v. Wolf Drug Co., 40 F.Supp. 103 (D.N.J.). But we are compelled to a different result by Healy v. Ratta. In Southern Fruit Co. v. Porter, 21 F.Supp. 1011 (W.D.S.C.), where an injunction was sought against a license and tax imposed on trucks, the court, in relying on Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700, found that the amount in controversy was the amount of tax imposed and held the jurisdictional amount was not present. Mention must also be made of those cases where injunctions have been sought against business regulations imposed by state statutes or municipal ordinances. *See* McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135; City of Lawton, Oklahoma v. Chapman, 257 F.2d 601 (10th Cir.). Petitioners in these cases asserted that the amount in controversy should be tested by the value of their businesses. The courts reasoned that the right being protected in these cases was the right to be free of the challenged regulations. The Court in *McNutt* said: "The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed." Under these authorities, in the case before us the damage which results from being required to comply with Rule 227 is the amount of the fee, thus the jurisdictional amount is not met. *See also* Gibson v. Jeffers, 478 F.2d 216 (10th Cir.).

28 U.S.C. §1343(3) gives the district courts original jurisdiction of actions:

> "To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . ."

Jurisdiction under this section is without regard to the amount of controversy. Howard v. Higgins, 379 F.2d 227 (10th Cir.). Plaintiffs have presented two claims which they urge establish jurisdiction under section 1343(3). One such claim is the allegation that the effect of Rule 227 is invidious discrimination against lawyers who do not pay the fee as

opposed to those who do pay. This they assert violates the rights to due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. Classifications are not created by the Rule. This claim is patently without merit, and will not support jurisdiction under section 1343(3).

Plaintiffs' second 28 U.S.C. §1343 claim is based on the doctrine of separation of powers. Plaintiffs argue that imposition and collection of a tax by the Colorado Supreme Court usurps the powers of the legislative branch in violation of the Colorado Constitution's provisions for the separation of powers. This violation is offered as a violation of the Fourteenth Amendment's guarantees of due process and equal protection. The principle of separation of powers is not enforceable against the states as a matter of federal constitutional law. This was the holding of the Supreme Court in Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311, which is the controlling authority on this question. *See also* Benoit v. Gardner, 351 F.2d 846 (1st Cir.); Snell v. Wyman, 281 F.Supp. 853 (S.D. N.Y.), aff'd 393 U.S. 323, 89 S.Ct. 553, 21 L.Ed.2d 511. In accordance with the holding in *Sweezy*, we find that plaintiffs' separation of powers claim is not a federal claim, and that federal jurisdiction under section 1343(3) is not available.

There is present no substantial federal question, and the trial judge correctly dismissed the complaint. *See* Cantor v. Supreme Court of Pennsylvania, 353 F.Supp. 1307 (E.D.Pa.), aff'd 487 F.2d 1394 (3d Cir.).

Affirmed.

BARRETT, Circuit Judge (concurring):

I fully concur in the excellent opinion by Judge Seth and in the result reached.

I believe that the appellants' complaint and cause of action is barred, and accordingly further subject to dismissal,

in that the Eleventh Amendment to the Constitution of the United States applies. The language of the Amendment is:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

The parties have not presented to us any Colorado statute which grants consent in the nature of waiver of its sovereign immunity in any suits against the defendants-appellees named here. The State of Colorado has affirmatively alleged and argued on appeal that no such statutory waiver exists. Suits against state boards, agencies, departments or branches, rather than against individuals serving and/or working in official capacities with such boards, agencies, departments or branches are unquestioned suits against a sovereign state if any part of the relief prayed for is money award. State Highway Commission of Wyoming v. Utah Construction Company, 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929). The Court there held that the Commission was but the arm or alter ego of the State and that no claim had been made that members of the Commission are personally liable. Where there is no clear intent in a state waiver of immunity statute to subject state agencies, boards or commissions to actions for money awards, together with other relief, in Federal Courts, such suits cannot be maintained. Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 66 S.Ct. 745, 90 L.Ed. 862 (1946); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945); Great Northern Insurance Co. v. Read, Insurance Commissioner, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1944); Murray, et al. v. Wilson Distilling Company, 213 U.S. 151, 29 S.Ct. 458, 53 L.Ed. 742 (1909); Williams v. Eaton, 443 F.2d 422 (10th Cir. 1971). In the latter cited case, we also held that unless there is law authorizing the Attorney General of a state to waive the immunity conferred by the Eleventh Amendment, he cannot do so by pleading to the complaint and by making a general appearance in defense. 443 F.2d 422 at 428.

Jurisdiction has reference to the power of the court over the subject matter, over the res or property in contest, and to the authority of the court to render the judgment or decree it is asked to render. Illinois Central Railroad Company v. Adams, 180 U.S. 28, 21 S.Ct. 251, 45 L.Ed. 410 (1901); 20 Am.Jur.2d, Courts, §88, p. 450.

It is fundamental that the court must, on its own motion, determine that it has jurisdiction over the case before it. Minnesota v. Hitchcock, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954 (1902); 3 A.L. R.2d 662. Jurisdiction in civil cases cannot be conferred by consent of the parties. Industrial Addition Association v. Commissioner of Internal Revenue, 323 U.S. 310, 65 S.Ct. 289, 89 L.Ed. 260 (1945); 175 A.L.R. 523. The jurisdiction of every court is limited by the principle of immunity of sovereign powers or their diplomatic representatives. United States v. Sherwood, 312 U.S. 584, 67 S.Ct. 767, 85 L.Ed. 1058 (1941).

This suit does not name any individuals as parties defendants. The action is against the Colorado Supreme Court, its unnamed Justices, its unnamed Clerk and the unnamed Colorado State Court Administrator. The defendants are not "persons" as contemplated under the Civil Rights Act. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Coopersmith v. Supreme Court, State of Colorado, 465 F.2d 993 (10th Cir. 1972). The Complaint makes it clear that the unnamed officials of the State of Colorado were at all times acting in their respective official capacities. It is firmly established that judges are cloaked with absolute official immunity or official privilege while exercising their official judicial functions and duties. Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973); Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), cert. denied 417 U.S. 908, 94 S.Ct. 2604, 41 L.Ed.2d 212 (1974).

In Smith v. Losee, *supra*, we specially recognized that state or local officials other than judges are entitled to a privilege doctrine in relation to acts or duties performed in the scope of their official power. We there stated, in part,

"We have described the absolute privilege of legislators, judges, *judicial officers*, and some executives which may be asserted as a plea in bar." 485 F.2d 334 at 342.

In Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961), we held that a district attorney, as a quasi-judicial officer, is immune from a damage suit while acting within the scope of his official duties. The same rule applies to each of the unnamed officials in this proceeding in addition to the Justices of the Colorado Supreme Court.

While the action does not seek personal money judgment from the unnamed officials, it does, inter alia, seek a refund of moneys allegedly paid to the State through the Clerk of the Colorado Supreme Court. The suit is, then, in essence a suit against the sovereign State of Colorado for the recovery of money. Under these circumstances the doctrine of sovereign immunity applies, even though the unnamed state officials are nominal defendants. Ford Motor Co. v. Department of Treasury of Indiana, *supra*; Williams v. Eaton, *supra;* Hamilton Manufacturing Company v. Trustees of State Colleges in Colorado, 356 F.2d 599 (10th Cir. 1966).

APPENDIX C

COLORADO RULES OF CIVIL PROCEDURE
Rule 227

Rule 227. Registration Fee

(1) Every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall pay an annual fee of $20.00; provided that the fee of any attorney whose first admission to practice is within the preceding five years shall be $5.00. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive, or cause to be sent and received, the notices and statements provided for hereafter. The fee shall be used only to defray the costs of disciplinary administration and enforcement, the costs incurred with respect to unauthorized practice matters, and the expenses incurred in the administration of this Rule. On or before August 1 of each year, the Chief Justice shall prepare, certify, and file with the Clerk a written report of the receipts and disbursements under this Rule during the preceding fiscal year ending on June 30th. These reports shall be public documents.

(2) Any attorney who fails to timely pay the fee required under paragraph (1) above shall be summarily suspended, provided a notice of delinquency has been issued by the Clerk and mailed to the attorney by certified mail addressed to the attorney's last known business address at least thirty days prior to such suspension, unless an excuse has been granted on grounds of financial hardship.

(3) Any attorney suspended under the provisions of paragraph (2) above shall be reinstated without further order upon payment of all arrearages to the date of the request for reinstatement.

(4) All persons required by this Rule to pay an annual fee shall on or before January 2 of every year, commencing January 2, 1974, file a statement, on a form prescribed by the Clerk, setting forth (a) date of admission to the Colorado Supreme Court, (b) current residence and office addresses, and (c) such other information as the Clerk may from time to time direct. In addition to such statement, every attorney shall file a supplemental statement of change in the information previously submitted within thirty days of such change. All persons first becoming subject to this Rule by admission after January 2, 1974, shall file the statement required by this Rule at the time of admission, but no annual fee shall be payable until the first day of January next following such admission.

(5) Within twenty days of the receipt of each fee and of each statement or supplement thereto filed by an attorney in accordance with the provisions of paragraph (4) above, receipt thereof shall be acknowledged, on a form prescribed by the Clerk, in order to enable the attorney on request to demonstrate compliance with the requirement of paragraphs (1) and (4) above.

(6) Any attorney who fails to file the statement or supplement thereto in accordance with the requirements of paragraph (4) above shall be summarily suspended until compliance, whereupon there shall be reinstatement without further order; provided such suspension shall not occur until thirty days following the giving of notice as provided in paragraph (2) above.

(7) An attorney who has retired or is not engaged in practice shall file a notice in writing that he or she desires to transfer to inactive status and discontinue the practice of law. Upon the filing of such notice, the attorney shall no longer be eligible to practice law but shall continue to file the statements required by this Rule for six years thereafter in order to be located in the event of complaints concerning conduct prior to transfer to inactive status. The attorney, however, will be relieved from the payment of the fee imposed by this Rule upon active practitioners.

(8) Upon the filing of a notice to transfer to inactive status, an attorney shall be removed from the roll of those classified as active until and unless a request for reinstatement is made and granted. Reinstatement shall be granted, unless the attorney is subject to an outstanding order of suspension or disbarment, upon the payment of any assessment in effect for the year the request is made and any arrearages accumulated prior to transfer to inactive status. (Adopted and effective October 25, 1973.)